

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 22, 2005 Session

NICOLE PAYNE v. PML, INC.

**Direct Appeal from the Circuit Court for Henry County
No. 1759 Creed McGinley, Judge**

No. W2004-01064-SC-WCM-CV- Mailed July 27, 2005; Filed October 19, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this case the employee, who had worked third shift for the employer, sustained extensive injuries from a one-car accident about twenty minutes after leaving the workplace. The employee contended that her exposure to the chemical toluene at work caused fatigue and drowsiness which led to her accident. The trial court found that the accident did not arise out of her employment and dismissed the case. For the reasons set out in this opinion, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court
Affirmed.**

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR.J., joined.

R. Stephen Doughty, Nashville, Tennessee, for the appellant Nicole Payne.

B. Duane Willis, Jackson, Tennessee, for the appellee PML, Inc.

MEMORANDUM OPINION

This case involves a September 7, 1999, car accident that occurred shortly after the employee left the employer's plant and the trial court's determination that her exposure to the chemical toluene at the plant was not a contributing factor in causing the accident.

The employee, Mrs. Nicole Payne (Denardo), was twenty-six years old at the time of trial and is the mother of two children. In August of 1998, she started working for PML, Inc., a company that manufactures rubber hoses. She operated an extruder machine that runs the hoses through a vat of

the chemical toluene. The chemical was taken from a large drum in an open bucket and poured into an open trough in the extruder machine.

Mrs. Payne testified that on occasion the toluene made her feel dizzy, light-headed, and nauseous at work. Several days before the car accident, she bent over to pick up something at work, became dizzy, stood up too fast, and hit her head on a bar. She completed an accident report and reported to her group leader who said that “sometimes the chemicals can make you feel dizzy.”

Mrs. Payne got off work the Friday morning before the accident and slept till around 3:00 p.m. when she got up and played with her children before getting a full night’s sleep. The next day, she and her husband, Allen Payne,¹ drove three hours to southern Illinois and went fishing. She slept eight to nine hours that night and returned home on Sunday. She stayed home and took care of the house and her two children on Sunday and got a full night’s sleep. On Monday she went out on a pontoon boat with her family for four or five hours. She left around 4:00 or 5:00 p.m. to go home with her husband and children. She took a shower and then “went to bed because I knew I had to work that evening.” She slept four or five hours and got up around 10:00 p.m. to go to work.²

Mr. Payne testified that after getting off the pontoon boat, “I told Nicole that I didn’t really want her to go to work because she didn’t have no sleep.” He stated Mrs. Payne had had a previous accident driving home from work. She fell asleep and ran her car up on the side of a curb. She had told him it was because she was tired.

Mrs. Tina Payne, Mrs. Payne’s ex-mother-in-law, testified under subpoena.³ Mrs. Tina Payne also worked at PML at the time of the accident and testified that prior to the accident, Mrs. Payne had mentioned problems with sleeping and that she would get tired driving home. On the day of the previous car accident (prior to the one at issue in this lawsuit), Mrs. Tina Payne testified that Mrs. Payne said “[s]he fell asleep going around the curb and hit the curb and busted a tire.”

Before she went into work the night before the accident, Mrs. Payne told Mrs. Tina Payne that she did not get any sleep after they were out on the pontoon boat. Mrs. Tina Payne arrived for work the morning of September 7, 1999, and saw Mrs. Payne at the plant after she got off work (just before the accident in question). Mrs. Tina Payne testified, “I could tell that she was really tired and I asked her . . . to let me take you home. And I kept asking probably three to four times. She said she was going to get her a soda and she’d be all right.” Later Mrs. Payne told Mrs. Tina Payne that the reason for the accident was that she fell asleep.

¹Mrs. Payne and Mr. Payne divorced sometime after the accident. Mr. Payne acknowledged that there were some problems regarding the divorce and some custody issues. Mrs. Payne has remarried and moved to Colorado. She is attending nursing school and expects to graduate in May 2004.

²In her deposition, Mrs. Payne said she had “laid down” before going to work.

³Mrs. Tina Payne did not want to testify because she did not want to cause any ill will between herself and Mrs. Payne or the grandchildren whom she sees once a year.

Mrs. Payne admitted she felt drowsy while driving home from work that night and on previous occasions. On September 7, the date of the accident, there was something “different in that just for some reason I just couldn’t stay awake no matter what I did that day.”

A truck driver who had followed Mrs. Payne for over fifteen miles stated that she swerved four or five times and veered into the left lane one time before the actual accident. He witnessed the accident: “She was going along normally and then suddenly veered off to the right at about a 45-degree angle with no brake lights or turn signals on to the shoulder and apparently she over corrected . . . and the car rolled over one time and landed on its wheels.”

Mrs. Payne was severely injured in the car accident which occurred within eighteen miles and about twenty minutes after she left PML. Mrs. Payne sustained intestinal and other internal injuries, a broken hip, and extensive scarring from the accident. She remained hospitalized for many weeks, had several surgeries, and suffered complications from her injuries.

In early 2001, Mrs. Payne received a telephone call from a friend and former co-worker who stated that OSHA had cited PML for violations for not labeling chemicals or holding safety meetings. Prior to this time she did not relate the toluene to her drowsiness or to the accident.

Ms. Kelly Cherry, Human Resource Manager, has worked for PML for eleven years. To her knowledge no other employee at PML has filed a workers’ compensation complaint for chemical exposure or for blacking out due to toluene. No other employee reported any problems with chemical exposure on the date of the accident. Mrs. Payne did not come to her on the day of the accident and report any dizziness. PML’s process for handling this chemical did not change after the accident. Testing by TOSHA on January 19, 2000, indicated a two to three parts per million level of toluene at the plant.

Mr. Ron Hudson, PML safety engineer at the time of the accident and currently serving as engineer, testified that to his knowledge PML has never been cited for hazardous levels of chemicals and that there has never been an overexposure or health-related incident in regard to toluene.

Dr. Roy Lynch DeHart, Director of the Vanderbilt Center for Occupational and Environmental Medicine, is board certified in occupational medicine. He has had extensive training in toxicology and commanded the Air Force toxicological laboratory but is not board-certified in that field. He testified: “The toluene clearly played a role [in the accident]. I don’t feel that she would have been dozing off without the addition of toluene.”

Dr. DeHart noted that Mrs. Payne’s circadian rhythm had been disrupted since she worked the midnight shift after spending several days off work. He stated that toluene is a neuro-toxin that in low doses can cause dizziness and drowsiness. He equated her exposure to toluene as she left the plant as similar to having taken an antihistamine. He opined that the chemical exposure played a significant role in her falling asleep. He stated that toluene still has biological effects for twelve

hours following exposure. He admitted that the symptomatology from exposure to toluene decreases after exposure to fresh air.

Dr. Kevin S. Merigian is board certified in medical toxicology, clinical pharmacology, and forensic medicine. In his opinion, the chemical had no effect on the accident. In the past, he has treated people in emergency rooms for industrial exposure to toluene. Dr. Merigian stated that at a level of two to three parts per million the chemical toluene would have “very little effect at all” on a person. He noted that 100 parts per million was the OSHA standard for acceptable levels of this chemical in a facility. He stated that Mrs. Payne would have had to have been exposed to more than 100 parts per million to black out or fall asleep. He saw no evidence that she was exposed to those levels.

In his opinion, Mrs. Payne’s accident was probably related to sleep deprivation or being tired, and toluene was not a factor. According to Dr. Merigian, any effects of toluene exposure would have worn off after twenty minutes exposure to fresh air, and there would be decreasing, not increasing, symptomatology remote from the exposure. He agreed that:

the properties of toluene are such that its exposure as claimed by Ms. Payne would have ceased to affect her ability to drive long before she could have traveled the approximately eighteen mile distance between PML and the accident site . . .

Any exposure to toluene sufficient to cause Ms. Payne to black out while driving would have also incapacitated her to the extent that she would never have been able to drive her car away from . . . Her employer’s premises after her shift at all.

The trial court found that her injuries did not arise out of her employment and stated that it could not find “that her exposure to toluene caused this accident or contributed in a significant way. That’s based upon the record as a whole, all of the lay testimony and particularly considering the medical proof.”

ANALYSIS

Review of findings of fact by the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers’ compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the

medical proof to determine where the preponderance of the evidence lies. *Cooper v. Ins. Co. of N. Am.*, 884 S.W.2d 446, 451 (Tenn. 1994).

The employee raises the issue of whether the evidence preponderates against the judgment of the trial court that the employee's injuries did not arise out of her employment and that in the face of reasonable doubt in the evidence of causation the trial court failed to grant all deferences and inferences to the employee.

In order to be eligible for workers' compensation benefits, an employee must suffer an "injury by accident arising out of and in the course of employment." *Tenn. Code. Ann.* § 50-6-102(12).

As stated in *Tobitt v. Bridgestone/Firestone, Inc.*, 59 S.W.3d 57 (Tenn. 2001):

The phrase "arising out of" refers to the cause or origin of the injury. An injury arises out of employment "when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection" between the work and the injury for which benefits are sought. In most cases, causation must be established by expert medical evidence, which may consist of medical testimony to the effect that a given incident "could be" the cause of the employee's injury when there is also lay testimony from which it reasonably may be inferred that the accident caused the injury. However, an employee may not base his or her claim on speculative or conjectural proof.

Tobitt, 59 S.W.3d at 61(citations omitted).

Dr. DeHart found that toluene was a contributing factor to the accident and equated it with using an antihistamine. Dr. Merigian found that it had no effect at all. In his opinion, if she had been exposed to levels of the chemical sufficient to cause her to black out, she would not have been able to drive at all when she left the plant. Any effects of toluene exposure would have worn off after twenty minutes exposure to fresh air, and there would have been decreasing, not increasing, symptoms remote from the exposure. Dr. Merigian has treated patients in the emergency room for industrial exposure to toluene and other chemicals. The trial court accepted the testimony of Dr. Merigian over that of Dr. DeHart as to causation.

When medical testimony differs, the trial court has the discretion to determine which medical testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996). In doing so, a court should consider, among other things, "the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

The trial court also considered the lay testimony about the amount of sleep Mrs. Payne had prior to starting her shift after being out on a boat for four or five hours. The trial court stated that in his judgment both the testimony under subpoena of the former mother-in-law as well as that of

the ex-husband were not in retaliation for domestic problems. The trial court was in the best position to judge the credibility of the witnesses.

After carefully reviewing the record in this case we find that the evidence does not preponderate against the finding of the trial court that Mrs. Payne's injuries did not arise out of her employment.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to the appellant.

JAMES L. WEATHERFORD, SR.J.

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**Circuit Court for Henry County
No. 1759**

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ORDER

This case is before the Court upon the motion for review filed by Nicole Payne pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Nicole Payne, for which execution may issue if necessary.

PER CURIAM